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# Cobrain Holdings Sdn Bhd v Perwira Bintang Holdings Sdn Bhd

HIGH COURT (KUALA LUMPUR) — WRIT OF SUMMONS NO 22C-3–04 OF 2013
MARY LIM J
1 OCTOBER 2013

*Civil Procedure — Trial — No case to answer — Submission of no case to answer — Counterclaim — No evidence led by plaintiff — Whether all evidence led by defendant must be assumed to be correct*

*Contract — Breach — Damages — Claim for payment for works done — Whether plaintiff estopped from claiming for payment due to settlement agreed at meeting — Whether unconscionable and inequitable for plaintiff to claim for payment — Whether any misrepresentation by defendant at meeting*

*Evidence — Presumptions — Adverse inference under s 114(g) of the Evidence Act 1950 — Non-calling of witness — Whether there was suppression or withholding of evidence — Whether adverse inference arose*

The defendant had awarded to the plaintiff RM14,150,000 worth of subcontract works. The works were completed. The plaintiff commenced this suit claiming for outstanding sums of RM3,857,230.42 which were said to be due and owing from the defendant. The defendant pleaded the defence of estoppel on the grounds that in a meeting on 29 September 2010, the parties had met, discussed and settled the matters pertaining the plaintiff's outstanding claims. The defendant claimed that it relied on these representations and position of the plaintiff in dealing with other subcontractors' claims and arranging its financial position in respect of the entire project. Hence, it was now unconscionable and inequitable for the plaintiff to resile from its conduct at that meeting. The defendant counterclaimed for a sum of RM575,335.28 which it claimed had been overpaid and which it claimed was agreed at that same meeting. The plaintiff on the other hand alleged misrepresentation by the defendant; denied that there was any settlement at the said meeting; and that its representatives who attended the said meeting had no authority to decide on financial matters. The counterclaim was also disputed.

**Held,** dismissing the plaintiff's claim and allowing the defendant's counterclaim with costs:

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(1) The irresistible inference was that the meeting in question did discuss and settle the matters as contended by the defendant. There was agreement reached between the parties on the terms as claimed by the defendant at that material meeting (see para 49).

(2) The allegations that the plaintiff's representatives were misrepresented; had no opportunity to speak at the meeting; and made to sign the minutes, were not believable. These allegations were not borne out by either of the testimonies of PW1 and PW2 or in the letters that were subsequently exchanged between the parties (see para 66).

(3) The plaintiffs witnesses were not believable or truthful and their evidence was not credible. In contrast DW1 was a truthful witness who told it as it was (see para 82).

(4) In relation to the non-calling of the plaintiff's managing director ('MD'), the presumption under s 114(g) of the Evidence Act 1950 could not be invoked. While the plaintiff's MD did not attend court to testify and no explanation had been given as to his absence, if the plaintiff's MD was a material witness, it could not be readily concluded that there had been suppression or withholding of evidence. The lack of testimony from this person appeared to be more on account of the plaintiff's failure to obtain evidence. Hence, the evidence of PW1 and PW2 was not corroborated by an important and material witness (see paras 87–88 & 90).

(5) The defendant had discharged its burden of proving its counterclaim. In a case of submission of no case to answer, the evidence led is taken as true and correct (see para 106).

**[Bahasa Malaysia summary**

Defendan telah memberi award kepada plaintif sejumlah RM14,150,000 untuk kerja-kerja subkontrak. Kerja-kerja tersebut telah siap. Plaintif telah memulakan guaman ini menuntut baki jumlah RM3,857,230.42 yang dikatakan tertunggak dan perlu dibayar daripada defendan. Defendan mempli pembelaan estopel atas alasan bahawa dalam mesyuarat 29 September 2010, pihak-pihak telah berjumpa, berbincang dan menyelesaikan perkara-perkara berkaitan tuntutan-tuntuan plaintif yang tertunggak. Defendan mendakwa bahawa ia bergantung kepada wakil-wakil tersebut dan kedudukan plaintif dalam mengendalikan tuntutan-tuntutan subkontraktor lain dan menguruskan kedudukan kewangannya berkaitan keseluruhan projek. Justeru, sekarang ini ia tidak berpatutan dan tidak saksama untuk plaintif menghentikan perlakuannya semasa mesyuarat tersebut. Defendan menuntut balas untuk jumlah RM575,335.28 yang didakwanya telah terlebih bayar dan yang didakwanya telah dipersetujui semasa mesyuarat sama. Plaintif sebaliknya mengatakan salah nyata oleh defendan; menafikan bahawa terdapat apa-apa penyelesaian di mesyuarat tersebut; dan bahawa representasinya yang menghadiri mesyuarat tersebut tidak mempunyai kuasa untuk membuat

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keputusan berhubung perkara-perkara kewangan. Tuntutan balas juga dipertikaikan.

**Diputuskan**, menolak tuntutan plaintif dan membenarkan tuntutan balas defendan dengan kos:

(1) Kesimpulan menarik adalah bahawa mesyuarat yang dipersoalkan telah pun membincangkan dan menyelesaikan perkara-perkara sebagaimana dihujahkan oleh defendan. Terdapat perjanjian yang tercapai antara pihak-pihak berdasarkan terma-terma yang didakwa oleh defendan pada mesyuarat tersebut (lihat perenggan 49).

(2) Pengataan bahawa wakil-wakil plaintif telah disalah nyatakan; tidak diberi peluang bercakap semasa mesyuarat; dan dipaksa menandatangani minit-minit, tidak boleh dipercayai. Pengataan tersebut tidak dinyatakan sama ada dalam testimoni-testimoni PW1 dan PW2 atau dalam surat-surat yang kemudian telah saling bertukar antara pihak-pihak (lihat perenggan 66).

(3) Saksi-saksi plaintif-plaintif tidak boleh dipercayai mahupun bersikap jujur dan keterangan mereka tidak boleh dipercayai. Sebaliknya DW1 adalah saksi yang boleh dipercayai yang memberitahu seperti mana apa yang sebenar berlaku (lihat perenggan 82).

(4) Berhubung pengarah urusan ('PU') plaintif yang tidak dipanggil, andaian di bawah s 114(g) Akta Keterangan 1950 tidak boleh digunakan. Di mana PU plaintif tidak menghadiri mahkamah untuk memberi keterangan dan tiada penjelasan telah diberikan berhubung ketidakhadirannya, jika PU plaintif adalah saksi utama, ia tidak boleh dengan mudah membuat kesimpulan bahawa terdapat penindasan atau penahanan keterangan. Kekurangan testimoni daripada orang ini dilihat lebih kepada kegagalan plaintif untuk memperoleh keterangan. Justeru, keterangan PW1 dan PW2 tidak disokong oleh saksi penting dan material (lihat perenggan 87–88 & 90).

(5) Defendan telah melepaskan beban pembuktiannya dalam tuntutan balasnya. Dalam kes penghujahan berhubung tiada kes untuk dijawab, keterangan yang dikemukakan dianggap benar dan betul (lihat perenggan 106). ]

**Notes**

For a case on adverse inference under s 114(g) of the Evidence Act 1950, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2416.

For a case on no case to answer, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) para 9873.

For cases on damages, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3206–3251.

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**Cases referred to**

*Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754, SC (refd)

*Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327, FC (refd)

*Jaafar bin Shaari & Anor (suing as administrator of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693, SC (refd)

*Munusamy v PP* [1987] 1 MLJ 492, SC (refd)

*Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 4 MLJ 66; [2010] 1 CLJ 381, FC (refd)

**Legislation referred to**

Evidence Act 1950 s 114, 114(g)

*James Culaz (Murugayah R Narayanasamy with him) (Muru & Partners) for the plaintiff.*

*S Selvarajah (R Ramanathan & James Lopez with him) (Fernandez & Selvarajah) for the defendant.*

**Mary Lim J:**

**[1]** The defendant and the plaintiff entered into direct negotiations which culminated in the defendant awarding to the plaintiff RM14,150,000 worth of subcontract works. These subcontract works involved electrical installation in respect of the defendant's design and build contract for Kompleks KDN/KA and Logistics, Bukit Aman, Kuala Lumpur. The letter of acceptance is dated 30 May 2007. The works were expected to be completed on 25 July 2009, subject to any extension of time as approved by the project manager and/or project director. The plaintiff's managing director, one Eric Tan (presumably Datuk Tan Seah Lin) and the defendant's representative, Ong Oung Kok signed on the original copy of the letter of acceptance.

**[2]** Clause 10 of that letter provided for 'payment, retention and period of honouring':

> Subcontractor is required to submit claim for work done at monthly interval. The submission date is fixed at end of the month. The payment will be honored 45 days from the date of certification of Main Contractor's claim.
>
> Progress payment shall be made in accordance with the immediate measurement of work executed for the period subject to a minimum of ten (10) percent retention sum to a limit of 5% of Contract Sum.
>
> The first moiety of retention sum shall be released upon finalisation of final account which is limit to twelve (12) months from the date of Certificate of Practical Completion for the Main Contract. The second moiety shall be released upon received on Certificate of Making Good Defects for the Main Contract.

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**[3]** On 5 December 2010, JKR issued a certificate of practical completion. On 21 December 2010, in accordance with the terms of the letter of acceptance, the plaintiff issued as built drawings and forwarded them to the defendant. At the material time, a total of 61 variation orders and 27 progress claims had been submitted by the plaintiff together with the as built drawings.

**[4]** According to the plaintiff, despite payment certificates Nos 23 and 24 being issued, there was no payment. The present claim is for outstanding sums of RM3,438,266.90 approved by PCR Sdn Bhd, the consultants of the project. The plaintiff further claimed that certain sums were wrongly deducted. The net effect of which is that a sum of RM4,769,201.62 is now still due and owing from the defendant.

**[5]** However, on the day of hearing, the plaintiff amended its claim to now read as RM3,857,230.42 as a result of its amalgamation of sums appearing at paras 9(a), (b) and (d) of its statement of claim. The amendments were allowed with no order as to costs. No consequential amendments were required of the defence.

**[6]** In defence to the claim, the defendant's principal defence is estoppel. The matters giving rise to this defence is a meeting on 29 September 2010 where the parties met to discuss the plaintiff's outstanding claims. At that meeting, the defendant claimed that the value of variation and additional works and certain other issues related to the finalisation of the subcontract account were ultimately settled or agreed between the parties. The defendant claimed that it relied on these representations and positions of the plaintiff in dealing with other subcontractors' claims and arranging its financial position in respect of the entire project. It was now unconscionable and inequitable for the plaintiff to resile from its conduct at that meeting.

**[7]** The defendant summarised the effect of the meeting at para 19 of the defence and counterclaim:

| | Item | Amount (RM) |
|---|---|---|
| (a) | Sub Contract Sum | 14,150,000 |
| (b) | Variation Order (as agreed at the said Meeting on 29 September 2010) | 205,775.50 |
| (c) | Variation Order for 5 omission items (as submitted by the plaintiff in letter dated 7 June 2011) | (56,128) |
| (d) | Revised Sub Contract Sum (d = a + b + c) | 14,299,647.50 |
| (e) | Less Debit Notes | 12,922,182.78 |

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| | | |
|---|---|---|
| (f) | Add Credit Notes for return of Worker Passes | 11,200 |
| (g) | Less Payments previously made | 2,258,000 |
| (h) | Balance Amount Due (h = d - e + f - g) | (869,335.28) |
| (i) | Contra Insurance settlement for damaged transformer | 255,500 |
| (j) | Amount owing by the plaintiff to the defendant G = h + i) | (613,835.28) |

**[8]** The defendant counterclaimed for a sum of RM613,835.28 which it claimed had been overpaid and which it claimed was agreed at that same meeting. This amount was also amended on the day of trial with the defendant crediting the sum of RM38,500 for salvage value of transformer that was damaged in the course of execution of the works. The defendant's counterclaim now stands at RM575,335.28.

**[9]** In its amended reply and amended defence to the counterclaim, the plaintiff claimed that the defence was a sham as nothing of any material consequence transpired at the meeting. It claimed that the meeting was merely a discussion on operational matters; that the plaintiff's representatives at the meeting had no authority to decide on financial matters as the real mandates was with the plaintiff's board of directors; that the variation sum of RM205,775.50 was challenged subsequently by the plaintiff in its correspondence with the defendant; that the principle of estoppel was not engaged where there is deception, cheating or wrongdoing on the part of the defendant. Details of such wrongdoing were set out at paras 4, 7 to 10.

**[10]** These allegations of deception were subsequently abandoned when the plaintiff withdrew paras 4, 7, 8, 9 (the words 'on account of the deception') and 10 of the amended reply and amended defence to the counterclaim. In substance, the plaintiff alleged misrepresentation by the defendant; denied that there was any settlement at that meeting; and that its representatives had no authority to decide on financial matters. The counterclaim was also disputed.

ISSUES

**[11]** The parties have agreed that a determination of what actually transpired at that meeting is absolutely vital to the further conduct of the respective claims of the parties. Hence, the bifurcation of the proceedings. In the event the court finds that there was no settlement reached at that meeting, then the court will proceed to assess the plaintiff's claim for damages.

**[12]** The issues for determination in relation to the meeting therefore are:

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(a) What was the purpose of the meeting on 29 September 2010?

(b) Whether any agreement was reached at that meeting?

(c) If so, what are the terms of the said agreement?

TESTIMONIES OF THE THREE WITNESSES

**[13]** These were the persons who testified. For the plaintiff, its representatives who attended the fateful meeting, namely, Liew Hon Lim ('PW1') and Chow Kim Meng ('PW2'). For the defendant, it was Tan King Lim ('DW1') who kept the minutes of the meeting.

**[14]** Both PW1 and PW2 gave almost identical evidence-in-chief as to what transpired on 29 September 2010. This is their evidence.

**[15]** PW1 was the plaintiff's senior site project manager. He joined the plaintiff in May 2000. He told the court that his job was 'reading both the original tender design drawings of the defendant and revised drawings due to changes in the design, raising variation orders, supervise the construction, implementing the changes in the design on the variation works ordered by the defendant, issuing all progress claims for plaintiff arising from the variation orders, responsible for drawing up as built drawings upon completion of work, coordinating with defendant employees at the site taking and receiving instruction from the management of the plaintiff, my employer'.

**[16]** PW2 has been with the plaintiff much longer. He has been with the plaintiff some 24 years. He informed the court that his role in the project was to assist PW1 in the same matters described by PW1.

**[17]** PW1 testified that the defendant called the plaintiff's firm and requested the plaintiff to attend a discussion on operational matters in relation to the implementation of the project and its related matters. The meeting was held at the defendant's premises. PW1 attended with PW2, the plaintiff's other operational senior manager. According to him, they 'attended the meeting in our capacities as project managers only'.

**[18]** PW1 further told the court that the plaintiff 'informed and directed' him 'to attend the discussion and report back matters discussed. That is the instruction of our employer Cobrain'. PW2 more or less echoed what PW1 said, except that unlike PW1, he told the court that the plaintiff 'informed us to attend the discussion and report back. That is all we were told to go by our employer Cobrain, to attend the discussion only'.

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**[19]** According to both PW1 and PW2's evidence, when both of them arrived at the defendant's office, they were given an attendance sheet that was prepared by the defendant. Both of them read that sheet which states: 'Discussion between PBH and Cobrain Attendance List'. After reading the contents of this sheet, both of them signed as attendees.

**[20]** Both of them testified that the 'meeting commenced wherein operational issues with regard to the project was discussed by all parties present.' Save for the necessary modification as to names, they gave identical evidence as to what transpired next:

> As we were discussing the operational matters at defendant's office, one Tan Kar Ling the project director of defendant was typing on his computer while the Managing Director Dato' Tan Kar Meng was talking in the meeting and reflecting his views.
>
> Being only employees and the fact that the meeting was only for a discussion, and for us to report back we signed the minutes of discussion and reported back to our Managing Director Datuk Tan Seah Sim. Neither Mr Chow Kim Meng nor myself have any authority express or otherwise whatsoever to agree on behalf of our employer Cobrain Holdings Sdn Bhd as to any Finalisation of Accounts of the plaintiff with PBHSB as we were only employees, nor did we enter into any Agreement whatsoever on financial aspect of my employer's claim with the PBHSB as alleged now by PBHSB.

**[21]** Both PW1 and PW2 observed DW1 typing 'simultaneously as the meeting progressed' but said that they did not know what was being typed. They claimed that they had no chance to put across their views on operational matters that were being discussed — see Q&A 27 or PW1 and Q&13 for PW2. Both of them claimed that the defendant's MD (Dato' Tan) 'was in full control of the meeting'. Both described the MD as a 'very forceful person' who talked 'endlessly in an authoritative manner raising all sorts of issues and answering himself all these issues raised by him'.

**[22]** They also told the court that no agenda for the meeting was given prior to the meeting. PW1 further testified that the variation orders and the plaintiff's progress claims were not discussed at this meeting. He denied agreeing to item (I) in the minutes in relation to the value of variation works, that a sum of RM205,775.50 is owed by the defendant to the plaintiff. According to him, it 'was the view of the managing director of the defendant Dato' Tan Kar Meng. My employer rejected that via letter dated 7 June 2011'.

**[23]** These witnesses next told the court that 'at the conclusion of the meeting, Dato' Tan Kar Ming ordered us to sign a document which was typed by Tan Kar Ling'. Both signed, PW1 after he had 'look at the letter which was dated 29 September 2010, which stated matters were in relation to a

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discussion'; both did so 'on the understanding, it was only minutes of discussion and nothing more'. Both claimed they were not given time to peruse the document but were 'only told to sign at the bottom of the pages as attendees', and leave. However, a photocopy of the document that they had signed was given to them 'on the spot'.

**[24]** Both of them claimed that they were not authorised 'to make concessions with regard to financial matters of the plaintiff during the meeting of 29 September 2010'. The reason given by both of them was that each of their 'job scope only involves operational matter with regard to the project. If there be any issues in relation to settling or finalisation of accounts it is within the authority of our managing director or the executive director to make such decisions'. PW2 added that 'the defendant should liaise with the plaintiff'.

**[25]** Upon their return from the meeting, both PW1 and PW2 reported to their managing director, Datuk Tan Seah Lim (presumably Eric Tan referred to at the outset). According to PW2, Datuk Tan 'then informed the defendant rejecting the minutes at the discussion. My Employer wrote back disputing said minutes and associated issues raised'. Both witnesses claimed that the meeting of 29 September 2010 was a misrepresentation and deception exercised on us to call us to attend said meeting and then called it a discussion. Later after the discussion claim it to be a meeting where as agreements is purportedly made, when all this is untrue.

**[26]** Both witnesses denied entering into any agreement with regard to monies owed to the plaintiff, or entering into any agreement whatsoever. They have since made separate but similar police reports on this.

**[27]** This is what the defendant's witness, Tan King Lim ('DW1') told the court. He was the person who prepared the minutes of that meeting.

**[28]** He told the court that the parties had already had several meetings and discussions between the technical officers of the parties to prepare for the final meeting on 29 September 2010. According to him, the purpose of this meeting was ' … firstly to settle the variation order work claims and issues related to the finalization of the sub contract account; secondly, to discuss issues on maintenance and service works; thirdly, to check the submission status for as-built drawings and O&M Manual; and finally for other matters'.

**[29]** By 'settle the variation order work claims', he meant that cl 9 of the terms and conditions in the letter of acceptance (pp 1–10), only the project manager or the project director can validly instruct the subcontractor to carry out variation work. The rate for such work shall be subject to mutual negotiation and agreement between the subcontractor and the contractor.

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These claims had been discussed earlier between the technical officers of the plaintiff and the defendant. One of the purposes of the meeting was to confirm once and for all the value of the VO claims based on the earlier discussions.

**[30]** In preparation for the meeting, DW1 'prepared a draft of matters to be discussed, a summary of the 61 VO claims and a summary of the debit notes issued for the plaintiff'. There were 213 debit notes to the value of RM12,647,379.51 listed in the summary.

**[31]** He confirmed that during the meeting, the parties discussed the validity and value of the 61 variation order claims and confirmed that the total amount for these claims was that stated in the summary sheet, that is, RM205,775.50. Parties further confirmed that this agreed amount did not include five omission items that were to be evaluated and included in the statement of final account. According to DW1, the plaintiff agreed to work out the value of these omission items and submit them to the defendant. The final subcontract sum was to be ascertained upon finalisation of the value of the omission items.

**[32]** DW1 told the court that agreement was also reached at that meeting on several other matters, namely:

(a) two outstanding back charge items of around RM100,000 relating to the hot dipped galvanised iron support for facade lighting, and power consumption used for testing and commissioning would be included later;

(b) the defendant 'had the right to issue further debit notes for fines, penalties and back-charges of the works, materials and services rendered as they occurred during the defect liability period and the maintenance period; and

(c) on the performance bond, maintenance sum, maintenance and service works, balance amount due to the plaintiff, right of the defendant to recover sum due, and submission status of asbuilt drawings; and O&M manual.

**[33]** According to DW1, immediately after the meeting, he used the draft record of matters that he had prepared earlier as a base and he included the matters that had been discussed and agreed at the meeting. In other words, he prepared the minutes of the meeting and he gave copies of the minutes to each party to go through and make comments. He saw PW1 and PW2 signed the minutes which stated that they had read and understood the minutes and that they confirmed that the minutes were correct and in order. He saw PW1 and PW2 initialed on each page of the minutes.

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**[34]** DW1 next informed the court that the plaintiff only wrote to the defendant on 6 October 2010 (letter received on 12 October 2010) conveying its disagreement with the value of the VO to be RM205,775.50 and where the plaintiff requested for a further meeting. The defendant replied on 20 October 2010 stating that since the VOs 'had already been discussed in detail and concluded with the consent of representatives of both parties at the said meeting ... there was no necessity to have a further meeting on this matter.' Correspondence then ensued between the parties.

THE PLAINTIFF'S SUBMISSIONS

**[35]** From the evidence adduced, the plaintiff has invited the court to consider the following factors which when put together shows that the plaintiff's version of the events as told by PW1 and PW2 is more credible:

(a) the chronology of events leading to the meeting where it was the defendant who telephoned the plaintiff to set a date for discussion;

(b) the plaintiff's witnesses attended in their capacities as the plaintiff's operational managers;

(c) the attendance list states 'discussion';

(d) both PW1 and PW2 testified that there was only one person talking and all others listening. That person was the defendant's MD who was brash and dictatorial and was just talking away while DW1 was typing on his computer;

(e) the meeting lasted one hour;

(f) the document that PW1 and PW2 signed at the end of the meeting was pre-prepared by DW1 on the understanding that it was only minutes of a discussion and nothing more;

(g) DW1 confirmed that he had pre-prepared the minutes and no copy was extended to the plaintiff earlier; and

(h) DW1 testified that he made changes to the pre-prepared minutes during the meeting and had given the minutes to PW1 and PW2 to sign at the end of the meeting.

**[36]** Learned counsel also submitted that to prove the liability of a company, it is necessary to prove that the employee who signed the documents has sufficient authority to do so. Since PW1 had testified that he was only the project manager, and that all matters relating to finance were within the jurisdiction of the Managing Director which evidence was corroborated by PW2, therefore, without actual or ostensible authority, the acts of both PW1 and PW2 cannot bind the plaintiff in any manner whatsoever with regard to financial and the settling of accounts. These witnesses have also testified as to

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their state of mind at the material time; that they were only there on instruction and only to discuss operational and site matters and nothing more.

**[37]** It is the plaintiff's case that since the authorised signatory of the plaintiff is its managing director, Dato' Tan Seah Lim, then the signing by anyone else is of no effect. And, that includes the minutes. The plaintiff pointed to the correspondences between the parties prior to and subsequent to the meeting as having been signed by that MD. If there is to be a binding agreement, then only that MD is to sign and no one else.

**[38]** Learned counsel submitted that the minutes stood only as minutes of the discussion only for PW1 and PW2 to refer to the plaintiff's board of directors for determination; and nothing else. It could not be found to be an agreement on the plaintiff's claims in respect of works pursuant to the variation orders. Any such finding is said to be 'contrary to company law and practice wherein low level employees could sign away the lawful claims of their employer. This cannot be right as these functions must be exercised by the board of directors who are the alter ego of the company, not its employees who cannot bind the company'.

**[39]** In any case, the correspondence between the parties showed that there is no consensus *ad idem* reached at the meeting. The plaintiff's letter dated 6 October 2010 was relied on in particular.

**[40]** Further, learned counsel submitted that it was a matter of common logic that since the plaintiff's claim was primarily about variation works relating to 61 variation orders, that could not possibly have been discussed in that one hour meeting. Applying the reasonable man test as set in the Supreme Court's decision in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754, the plaintiff asked 'would the plaintiff having carried out variation works for the sum of RM3,438,266.90 sign away all those monies for a paltry sum'. The plaintiff thereby invited the court to answer the issues posed in its favour.

THE DEFENDANT'S SUBMISSIONS

**[41]** The defendant, on the other hand, argued that the purpose of the meeting on 29 September 2010 was precisely as stated in the minutes as found in pp 12–15 of the bundle comprising the letter of award/acceptance, correspondence and police report. As recorded, a number of issues were discussed and agreement was reached at that meeting. The terms of agreement were also as recorded in those minutes. The attestation to the minutes further

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backs up the defendant's position. To further corroborate its defence, the defendant referred to the conduct of the plaintiff before and after the meeting as consistent with its contentions.

**[42]** Although no agenda was given to the plaintiff before the meeting, the defendant submitted that that did not derogate from the fact that it was the defendant's CEO who had called the plaintiff for a meeting. In response to this call, the plaintiff's MD directed two of his senior project managers to attend. The defendant suggested that it was unlikely that the plaintiff would have sent such senior personnel just to discuss operational matters; it surely must have been about finalisation of the account of the subcontract as claimed by the defendant.

**[43]** Further, the defendant contended that if PW1 and PW2 were directed to attend and discuss only operational matters, they ought to have indicated as much upon arrival and certainly when PW1 was given the VO summary sheets by DW1. These sheets contained the defendant's proposal on the validity and value of the VO works and the summary of the debit notes. These were quite clearly financial matters. There is no evidence of the plaintiff's representatives having informed the meeting of such direction, if indeed there was any as claimed. Instead, the evidence shows the two representatives participating in the entire meeting without reservation.

**[44]** The defendant also relied on the attestation found in the minutes. PW1 specifically confirmed that he had understood the minutes, especially its record of the purpose of the meeting which included the settlement of the variation orders. He also confirmed in court that the minutes were correct and in order; and both he and PW2 confirmed that they were not forced or subjected to any threats to sign the minutes.

**[45]** More telling was PW1's testimony that he had agreed to items such as the performance bond, maintenance, debit notes, and balance. The defendant pointed out that these other matters are actually financial and not operational matters. To single out that he had not agreed to the variation orders which he claimed to have voiced his disagreement was furthermore a contradiction of the plaintiff's contentions that the attendees were merely there to hear the discussion and report back to the plaintiff's managing director.

**[46]** The defendant next relied on the correspondence exchanged between the parties following from the meeting. Nowhere in that exchange is there any of the allegations made today; that the attendees were only attending a discussion, that they were forced to sign, or that the attendees had no mandate or authority to decide for the plaintiff. In contrast, the defendant's claim in its

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letters to the plaintiff that agreement had been reached at the meeting has never been corrected or challenged by the plaintiff.

**[47]** Then, there is this further meeting between the parties on 19 March 2012. The plaintiff was represented by its managing director and the same two senior project managers who testified in court. The defendant was represented by its CEO and DW1. The matters discussed at this meeting are carried in a letter dated 20 March 2012. This letter as well as another from the plaintiff dated 22 March 2012 referred to the meeting of 29 September 2010 as the 'final account meeting'. With such evidence, the defendant submitted that there was no basis for the plaintiff's contention that the attendees to the meeting had no requisite authority and mandate; that they were forced to sign the minutes or that they were misrepresented by the defendant.

**[48]** At the same time, the same evidence shows that agreement was reached at the meeting on the matters recorded in the minutes. The plaintiff's own action subsequent to the meeting, by extending the performance bond and submitting the maintenance schedule that was required corroborates the defendant's case.

*Findings*

**[49]** Having heard all three witnesses, observed their demeanour and examined their evidence against the contemporaneous documentary evidence, I must agree with the defendant and its submissions on the issues posed. The irresistible inference is that the meeting in question did discuss and settle the matters as contended by the defendant, and as testified by DW1. My reasons are as follows.

**[50]** First and foremost, it would appear that it is the plaintiff's primary case that its attendees at the critical meeting were not authorised or mandated to make decisions for the plaintiff; that that decision resides solely with the board of directors of the plaintiff in which case, any decision taken at that meeting does not bind the plaintiff.

**[51]** If that be the position, it would be reasonable to infer that the plaintiff is not really challenging the existence of the decisions made or taken at that meeting; including any or all made by its attendees. As far as the plaintiff is concerned, it is not bound for the reasons it has offered.

**[52]** Dealing first with this, let me start by saying that the court finds as a matter of evidence and law that there was agreement reached between the parties on the terms as claimed by the defendant at that material meeting. As I understand the plaintiff's version of the meeting, it was only a discussion with

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the plaintiff's representatives attending only with the intention of discussing operational and not financial matters. PW1 and PW2 were not authorised to discuss and decide on any financial matters. At the meeting of one hour duration, the defendant's MD monopolised the meeting. PW1 and PW2 were not allowed to speak because the MD was a very forceful person. At the end of the meeting, they signed the minutes because it was titled 'discussion'.

**[53]** In my view, it actually does not matter what the meet up between the parties is termed; whether it was called a 'discussion' or a 'meeting'. What is important is whether it did take place. Here, the parties are at least, in agreement and from the evidence of the witnesses, it can be safely drawn the following uncontroverted facts:

(a) there was a meeting between the parties;

(b) the meeting was held on 29 September 2010;

(c) it was held at the defendant's office;

(d) the defendant's managing director, one Dato' Tan Kar Meng telephoned the plaintiff's managing director to set up that meeting;

(e) the plaintiff sent its senior managers, Liew Hon Lim (PW1) and Chow Kim Meng (PW2);

(f) the defendant was represented by Dato' Tan Kar Meng, Tan King Lim (DW1), Heinko Dona Madon, Terence Ng Yew Fatt and Ho Weng Keap;

(g) an attendance list was taken confirming the seven names : p 17;

(h) minutes were taken at the meeting: pp 1–5;

(i) minutes were taken by DW1;

(j) there were attachments to those minutes: pp 5–16;

(k) the meeting lasted an hour;

(l) correspondence between the parties followed the meeting:

  (i) the plaintiff's letter dated 6 October 2010: p 22;

  (ii) the defendant's letter dated 20 October 2010: p 23;

  (iii) the defendant's letter dated 19 May 2011: p 24;

  (iv) the plaintiff's letter dated 7 June 2011: p 25;

  (v) the defendant's letter dated 15 June 2011: p 50;

  (vi) the plaintiff's letter dated 24 October 2011: p 51;

  (vii) the defendant's letter dated 20 March 2012: p 55;

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(viii) the plaintiff's letter dated 22 March 2012: p 58;

(ix) the defendant's letter dated 5 April 2012: p 60;

(x) the defendant's letter dated 5 February 2013: p 62; and

(xi) the plaintiff's letter dated 20 February 2013: p 68.

**[54]** Aside from the names and details of the attendees, the attendance list which is handwritten states:

Bukit Aman

Discussion between PBH & Cobrain

Date: 29/9/10

Time: 1 pm

Attendance List

Name/signature Company Position

**[55]** Having determined that the discussion did take place; next is to determine what transpired during that discussion. Here, minutes were taken during the discussion. As is the general purpose of minutes, it records what was discussed.

**[56]** These are the minutes in question:

Project Title: Cadangan Pembinaan Kompleks KDN/KA Dan Logistik, Bukit Aman, Kuala Lumpur Secara 'DESIGN & BUILT'

Sub Contract: Electrical Installation Works

---

Date of Discussion: 29 September 2010 Time: 1 PM

Venue: Perwira Bintang Holding Sdn Bhd Office at No 48, Jalan PJS 8/6, Bandar Sunway

---

Dato' KM Tan of Perwira Holding Sdn Bhd (herein after refers to as PBH) has called and invited Principal/Senior Management of the Sub Contractor, Cobrain Holdings Sdn Bhd (herein after refers to as Cobrain) for this discussion.

The purpose of this discussion is

(1) to settle the variation order work claim and issues related to the finalisation of the sub contract account,

(2) to discuss issues on maintenance and service works

(3) to check the submission status for as-built drawings and O&M manual

(4) other matters

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The following matters have been discussed and agreed upon,

1. Final Revised Sub Contract Sum and Variation Orders The variation order has been agreed at RM205,775 (see attached sheets for detail). This amount does not include the value of omission works.

The discussion has been informed and confirmed that there are 5 omissions to be evaluated and included in the Statement of Final Account in due course

(a) Manhole for Phase 2 (due to omission of Phase 2 works)

(b) Change in light fittings at L16 and L29 due to change of ceiling from 2' x 4' panel to plaster board ceiling

(c) External light (compound lighting)

(d) Facade Lighting

(e) L30 server room raise floor trunking

Cobrain has agreed to work out the value of omission and submitted to PBH by or before 6 October 2010 for evaluation.

The Final Sub Contract Sum will be ascertained upon finalisation of value of omission.

2. Debit Note

The debit notes for fine, penalty and back charges for the works, materials and services rendered by PBH to Cobrain has amounted to a total of RM12,647,379.51 until 16 August 2010 (see attached sheet for details).

There are 2 outstanding back charge items that have been agreed and have yet to be included. There are

(a) Hot dipped galvanised iron support for facade lighting

(b) Power consumption used for testing and commissioning, and it is agreed at around RM100,000

The amount of Debit Note to date appears in the Statement of Final Account will not be conclusive. PBH has the right to issue further Debit Notes for fine, penalty and back charge of the works, materials and services rendered as it occurs and happens during the Defect Liability Period and/or maintenance period.

3. Performance Bond

Terms of the Sub Contract had explicitly stipulated that 'The validity of the bond shall be up to the Main Contract's DLP or CMGD, whichever is the later'

In this relation, the Performance Bond Bank Guarantee shall be extended to expire on 19 August 2012 (2 years 4 months from CPC Date of 19 April 2010). Cobrain has agreed to comply.

4. Maintenance Sum

JKR is withholding a Maintenance Sum for the Mechanical and Electrical Works in the Main Contract.

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The Maintenance Sum will be paid progressively in corresponding to the maintenance and service works carry out during the maintenance period, and will be certified by JKR

In line with this Main Contract requirement, PBH is proposing the Sub Contract Maintenance Sum to be fixed at an amount equivalent to 5% of the Sub Contract Sum. Cobrain agrees to the proposal.

It is agreed that Cobrain shall pay to PBH the total amount of deduction or omission imposed by JKR for any of Cobrain default in carrying out maintenance and services works.

5. Maintenance and Service Works

Cobrain has agreed to submit a maintenance schedule with clear and definite dates insert on it.

Cobrain has agreed to carry out maintenance and service works strictly in accordance to the agreed and approved schedule, and has further agreed that should there be any delay in carry out the maintenance and service works by 3 days from the approved schedule, Cobrain will accept the penalty of RM2,000imposed by PBH.

Any penalty imposed by PBH shall not relieve Cobrain from their responsibility and obligation in the Contract, and Cobrain has further agreed to be responsible and liable and will accept all claims, cost and expenses incurred directly or indirectly from Cobrain default in complying the schedule and/or in carrying out maintenance and services works.

6. Balance amount of Payment due to Cobrain

The balance amount of payment due, if any, after less from the revised Sub Contract Sum, the retention sum, previous payment made and such other agreed sum to be withheld, shall be released by PBH on condition that Cobrain has deposited with PBH the extended Bank Guarantee, submission of approved As-Built Drawings and O&M Manual, or such other matters PBH deem necessary.

7. Right of PBH to recover Sum due

It is agreed that for those amount that Cobrain is liable for as above described, PBH has the right to recover the sum from the sub contract retention sum and/or from Bank Guarantee, and/or other resource.

8. Submission Status of As-Built Drawings and O&M Manual

As-Built Drawings are ready except some outstanding drawings, Cobrain agrees to submit by the following day (ie on 30 September 2010). Cobrain has agreed to liaise closely with PCR Sdn Bhd to ensure that the O&M Manual is ready for submission to PBH by tomorrow (ie on 30 September 2010).

We are attendance to the discussion, we have read and understand the above minutes and we hereby confirm they are correct and in order.

Representatives from Perwira Bintang Holdings Sdn Bhd

Dato Tan Kar Meng

CEO

Mr. Terence Ng Yew Fatt

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M&E Coordinator

Representatives from Cobrain Holdings Sdn Bhd

Mr. Raymond Liew Hon Lim

Senior Project Manager

(Emphasis added.)

**[57]** It is clearly recorded that the purpose of the minutes was to discuss four matters. Included was the matter of the variation order work claims by the plaintiff that was related to the finalisation of the subcontract account. After listening to the testimonies of all three witnesses, I find no reason to doubt the veracity and accuracy of these minutes taken and prepared by DW1. I find him truthful and credible.

**[58]** In the matter of the agenda, I actually find this of no real consequence. As explained by DW1 and confirmed by PW1, the parties had been meeting long before this particular meeting, especially amongst the technical staff. It seems the parties had held some 4 to 5 prior meetings on matters including the variation orders. All that was left was the finalisation of the accounts which will include settling the position of these 61 variation orders.

**[59]** As for whether there was any misrepresentation by the defendant, the answer is in the negative. While PW1 and PW2 testified in their evidence-in-chief that they were only there to discuss operational matters, that does not appear to have impeded them in any way. In the first place, it was only PW1 who told the court in his evidence-in-chief that the issues relating to the VOs and the progress claims were not discussed at the meeting. PW2 was silent on this.

**[60]** I find it hard to believe PW1 given that the parties were at the stage of finalising the accounts; and given that he had admitted that other matters such as performance bonds and maintenance issues were not only discussed, but had been agreed by him. These other matters are so closely related to the VOs and the progress claims that there could not have been any concession on them without the settlement of the earlier two items.

**[61]** I also find it difficult to accept that the parties were still taking about 'operational matters' given that at that time, the project had been completed and the CPC was underfoot leaving outstanding matters such as the variation orders, progress claims, performance bond, maintenance, and debit notes. In fact, only payments on the two certificates 23 and 24 were under consideration. Given that it was only the two certificates that were still due from the defendant, that is, payment; I cannot see what other operational and site matters were left for settling between the parties.

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**[62]** The next reason is the attestation to the minutes of the meeting. Both PW1 and PW2 testified in English during the trial. They were proficient and had no difficulty whatsoever understanding the questions put to them. Both testified that they had read the attendance list and the minutes before signing them. Both understood what they read before signing. In fact, PW1 confirmed that the minutes were correct and in order during cross-examination. Under such circumstances, I cannot see how these witnesses can still come forward to offer any other explanation save what was obviously minuted. In the minutes are clear records of the 'purpose of the discussion'; details of what was 'discussed and agreed upon'; and most critically, the concluding words 'that *We are attendance to the discussion, we have read and understand the above minutes and we hereby confirm they are correct and in order'*. These two witnesses for the plaintiff understood perfectly what transpired at the meeting; and they confirmed that understanding by signing on to the minutes as recorded without any hesitation or reservation.

**[63]** I further do not put much stock in the fact that DW1 had pre-prepared a draft of the minutes. DW1 candidly admitted to this. I accept his explanation that the technical officers of the parties had held several prior discussions and meetings to prepare for the meeting on 29 September 2010; which meeting was understood as a final meeting on the accounts. The integrity of these minutes which have been read and understood by PW1 and PW2 before signing them and which have been confirmed again in court as correct and in order, are not diminished or compromised by this act of DW1. The explanation given is reasonable and logical in the given circumstances.

**[64]** Although the minutes do not ascribe such details as to what was said by each attendee at the discussion or meeting; again, I agree with the defendant that nothing turns on this. What is significant is that both of plaintiff's witnesses informed the court that they observed DW1 typing away as the discussion or meeting progressed. This confirms the contemporaneous nature of the record. Both PW1 and PW2 had every opportunity of either correcting or signing with reservations of any degree or nature; yet they did not. This indirectly confirms the testimony of DW1.

**[65]** Further, the court cannot accept the suggestion that the minutes ought to be rejected because they were never sent to the plaintiff officially. This is absolutely unnecessary since the plaintiff's representatives brought a copy of it back to the plaintiff's MD. There can be no better communication than this personal service of these minutes, picked up by the attendees themselves immediately upon conclusion of meeting while everything was still fresh, leaving minimum room for any erroneous recollection. In any case, the plaintiff's MD did receive the minutes as disclosed in the plaintiff's correspondence following the meeting. Furthermore, there was never any

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protest that the minutes were not sent or sent 'officially'. This is really quite trivial and has no bearing whatsoever to the integrity of the minutes.

**[66]** On the matter of allegations that the plaintiff's representatives were misrepresented; had no opportunity to speak at the meeting; and made to sign the minutes, I find this not believable. These allegations are not borne out by either of the testimonies of PW1 and PW2 who are senior personnel of the plaintiff; or in the letters that were subsequently exchanged between the parties.

**[67]** The allegations presently made of coercion or being forced to sign are serious. Assuming for a moment that what PW1 and PW2 tell the court indeed happened, I would have expected immediate reactions from the plaintiff. Particularly, I would have expected the plaintiff to correct the status of the minutes besides making their allegations.

**[68]** Instead, there is a deadly silence from the time of the meeting until the present claim where this position was assumed. A perusal of the correspondence reveals no such claim, not even a squeak or a suggestion that something improper had transpired at the meeting. This serves only to show that the plaintiff's present claims are but after thoughts, raised for the first time long after the meeting of 29 September 2010 had been concluded with the settlement as contended by the defendant.

**[69]** It was only after the plaintiff had reviewed its own financial position that the plaintiff requested a reconsideration of the matters agreed or a further meeting. In its letters to the defendant sent after the meeting, the plaintiff is seen reverting on the outstanding matters such as the omissions, drawings and the debit notes.

**[70]** In these letters, the plaintiff can be seen asking the defendant for another meeting in view of its financial status. In the plaintiff's letter dated 6 October 2010 (p 22) sent after the meeting, the plaintiff stated:

> **CADANGAN PEMBINAAN KOMPLEKS KDN/KA DAN LOGISTIK BUKIT AMAN, KUALA LUMPUR SECARA 'DESIGN & BUILD' MELALUI RUNDINGAN TERUS**
>
> **VO No 1 to 61 and Debit Notes**
>
> We refer to the meeting on 29 September 2010 concerning the abovementioned matter.
>
> We have conducted a further internal review of the overall cost incurred by us in executing the works, unfortunately, the financial statements reflects a very discouraging scenario.

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Considering the above and the vast disparity between the certified variations of RM896,971.20 by your consultant and the evaluation of RM205,775.50 by your project team, which we wish to regrettably inform you that we are not agreeable to it; may we seek to have a meeting with your personally to resolve this matter.

We thank you very much for your kind consideration and look forward to meeting you personally soonest.

**[71]** The defendant responded to this request vide its letter dated 20 October 2010 (p 23) which states:

**CADANGAN PEMBINAAN KOMPLEKS KDN/KA DAN LOGISTIK BUKIT AMAN, KUALA LUMPUR SECARA 'DESIGN & BUILD' MELALUI RUNDINGAN TERUS**

**VO No 1 to 61 and Debit Notes**

---

We have received on 12 October 2010 via facsimile transmission, your letter ref A6808/PBHSB/10/10/RL/slc dated 6 October 2010 attention to our Dato' Tan Kar Meng, stated that you are not agreeable to the amount of evaluation for the VO No 1 to 61 that have been concluded at RM205,775.50 by both parties in the discussion held on 29 September 2010 attended by your representatives and our representatives including Dato' Tan Kar Meng, and you are seeking to have a meeting personally with Dato' Tan Kar Meng to resolve this matter.

We have conducted a further internal review of your request, and have to reply regrettably that as the Variation Orders (addition works) had already been discuss in detail and conclude with the consent of both parties representatives in the said meeting (please see the minutes of discussion item no. 1), as such the agreed amount is proper and in order, there will not be any necessity to have further meeting on this.

However, we may have a meeting to resolve Variation Order (omission works) which your representatives had committed to submit to us by 6 October 2010, but until to date we have not received a copy.

**[72]** In this letter, the defendant categorically referred to the detailed discussion and conclusion reached by consent of both parties' representatives at the meeting on the value of the variation orders as well as to the minutes of the meeting. There was no response or follow up from the plaintiff on this. Since there was no protest or clarification in the plaintiff's previous letter, it would be quite reasonable if not logical and natural to see some once the defendant pointedly clarified that settlement had been achieved at the meeting of 29 September 2010. Yet, there was none. The plaintiff did not even correct or clarify that there was no agreement; or that PW1 and PW2 had no mandate or authority to agree at that material meeting.

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**[73]** In fact, there was nothing from the plaintiff until almost a year later, on 7 June 2011 (p 25). Even then, it was after the defendant had sent a letter dated 19 May 2011 (p 24). In its letter dated 19 May 2011, the defendant said:

> **CADANGAN PEMBINAAN KOMPLEKS KDN/KA DAN LOGISTIK BUKIT AMAN, KUALA LUMPUR SECARA 'DESIGN & BUILD' MELALUI RUNDINGAN TERUS**
>
> **Account Status**
>
> _____
>
> Further to the Final Account discussion held on 29 September 2010 at our office, we would advise that, your status of account with Perwira Bintang Holdings Sdn Bhd is as follows:

| | |
|---|---|
| Sub Contract Sum | RM14,150,000.00 |
| Variation Order (pending finalisation of 5 omissions) | RM250,775.50 |
| Revised Sub Contract Sum (while pending finalization of 5 omissions) | RM14,355,775.50 |
| Less Debit Notes to date | RM12,744,269.83 |
| Less Payment previously paid | RM2,258,000.00 |
| Balance Amount Due | RM(646,494.33) |

> Please check your account and verify as soon as possible. Unless you could prove otherwise, it is obvious that we have overpaid RM646,494.33 to your account.
>
> In view of this, we would like to have a meeting with your company to resolve this issue.
>
> Kindly inform us of your available time for the meeting.

**[74]** At this point, the defendant had noticed a possibility of an overpayment of RM646,494.33 to the plaintiff from its checking of the account status. The defendant asked the plaintiff 'to check your account and verify as soon as possible'. It also sought a meeting with the plaintiff 'to resolve this issue'.

**[75]** It was in only in response to this claim of overpayment by the defendant that the plaintiff raised for the first time, that there was no agreement at the discussion of 29 September 2010. In its letter of 7 June 2011 which is captioned 'review account status', the plaintiff stated:

> **CADANGAN PEMBINAAN KOMPLEKS KDN/KA DAN LOGISTIK BUKIT AMAN, KUALA LUMPUR SECARA 'DESIGN & BUILD' MELALUI RUNDINGAN TERUS**
>
> **Review Account Status**
>
> With reference to the above matter subject and your letter ref. 0090-C/11/9677 date 19 May 2011, we are pleased to inform you that we do not agree on the overpaid amount due to us amounting to RM646,494.33.
>
> Previously, we have submitted the additional variation order works (VO. 1-61) complete with supporting drawings and site instructions to Mr. Terence Ng from

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PBH and he had proposed a no. of VOs which were illegitimate during the VO discussion on 29/12/2010 at your good office.

During the discussion in which we did not agree on the VOs that you had certified amounting to RM205,775.50 which was a vast difference from the Consultant's evaluation. According to the supporting drawings and site instructions, we are entitled to claim the additional works (refer to revised Cobrain's VO list) which are not in the drawings or bill of quantities.

We attach the following lists for you to review and justify:

(1) Account Status

(2) Cobrain's VO list with Consultant's validity of claim and Cobrain's revised VOs with reasons for Variation.

(3) Five (5) omission items from Contract

(4) Insurance claim on damaged Transformer

We also submit herewith the debit note list which we did not agree as they were tied up with the additional works which had been carried out at site (inclusive of external works).

Your kind consideration and approval to the above would definitely help to improve our rather dismay project account.

We thank you very much for your kind consideration and look forward to your favorable reply.

**[76]** Again, this letter speaks volumes. At the penultimate paragraph of the letter the plaintiff is seen asking the defendant to consider and approve its claims on the VOs which it said 'would definitely help to improve our rather dismay project account'.

**[77]** From these records of correspondence, it becomes apparent that the plaintiff's conduct is not consistent with what it maintains presently in court. It is in fact consistent with what has all along been contended and maintained by the defendant; and that is the purpose of the meeting on 29 September 2010 is as recorded in the minutes kept; that agreement was reached between the parties at that material time; and that the terms of the agreement are as recorded in the minutes prepared by DW1 and signed by both PW1 and PW2, after they had read and understood its contents; confirming that the minutes were correct and in order.

**[78]** Next, the court is not persuaded that these two representatives of the plaintiff did not have the necessary mandates or authority to decide on behalf of the plaintiff. The evidence shows that the two personnel sent for the meeting were indeed authorised to attend and make decisions on the plaintiff's behalf.

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**[79]** These two senior personnel of the plaintiff, one of whom has at least 24 years experience with the plaintiff, were sent by the plaintiff's own managing director. The plaintiff was fully aware of what was the purpose of the meeting (especially since the parties have already had several meetings before this), and had singled out these senior persons to attend. The plaintiff was also fully aware of what had transpired at the meeting as the two attendees debriefed upon return from the meeting bearing their copy of the signed off minutes.

**[80]** Given that the calling of the meeting was agreed between the two Managing Directors, it would be reasonable to say that the parties would have ensured that the proper personnel attended. If indeed what the plaintiff claimed today happened, that the meeting went beyond the terms or purpose, I would have expected the plaintiff's MD to have picked up the phone to protest immediately upon being briefed and shown the minutes; or put the whole protest on paper; including claiming that PW1 and PW2 had no mandates. Instead, there is this deep chasm of silence which grew longer till the present claim was filed.

**[81]** In addition, the plaintiff itself had seen to various other matters that it had agreed at that meeting. Those matters included items 3 and 5 in the minutes concerning the extension of the performance bond and the submission of the maintenance schedule.

**[82]** In summary, the court does not find the plaintiff's witnesses believable or truthful and I do not find their evidence credible. The court finds in contrast DW1 to be a truthful witness who told it as it is. Insofar as the minutes of the meeting are concerned, it is observed that the plaintiff's objections are not as against the total contents of the minutes but only in a limited respect.

**[83]** I find that highly irregular. The plaintiff cannot pick and choose which parts of the minutes best suits its ends. The minutes must be taken in totality. The fact that the plaintiff went on to extend the performance bond and to submit the requisite documents show not only financial matters were discussed or that the attendees participated at the meeting, but that the minutes accurately and correctly recorded the matters discussed and agreed at the meeting.

**[84]** The ensuing correspondence further fortifies this finding. In the first letter sent shortly after the meeting, there is no protest from the plaintiff about the matters now raised. I agree with the defendant that the plaintiff themselves referred to the meeting of 29 September 2010 as one on the finalisation of the final accounts. It is reasonable and logical that that would be the very agenda as that was what was still pending between the parties; and it would have been in the plaintiff's interest to have that resolved so that it could be paid.

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**[85]** There are still two other matters, the police reports made by PW1 and PW2. In view of the observations and findings above, the court agrees with the defendant that these police reports are more self-serving than anything else. The court is concerned with how this avenue is frequently resorted to without care as to the consequences and responsibility that come with making such reports. These reports were only lodged in March of this year. Both police reports refer to the defendant's solicitor's letter of demand of 25 March 2013 as containing a false claim against the plaintiff and containing an allegation that they, PW1 and PW2, had agreed to the defendant's claim.

**[86]** The defendant had already alluded to the detailed discussion and conclusion reached by mutual consent of the parties' representatives at the meeting of 29 September 2010 as early as in its letter dated 20 October 2010. It is reasonable to say that the plaintiff's MD would have verified this contention with PW1 and PW2; and consequently PW1 and PW2 would have been alerted to this 'allegation' at that time. That being so, there is substantial delay in the making of these police reports that seriously undermine the truth of their contents.

**[87]** Then, there is the non-calling of the plaintiff's MD. This issue of mandate or authorisation is best answered by the person who directed PW1 and PW2 to attend the fateful meeting, that is, Datuk Eric Tan Seah Lim. He has remained conspicuously absent. No explanation has been put forth.

**[88]** The defendant has sought to invoke the presumption under s 114(g) of the Evidence Act 1950 with this absence of Datuk Tan. With respect, the court declines. While this witness has not attended court to testify and no explanation has been given as to his absence, it cannot be readily said that in itself is a withholding of evidence.

**[89]** Section 114 of the Evidence Act 1950 deals with the rebuttable presumption of facts. The court 'may assume the existence of facts which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case'. Nine illustrations are given under this section.

**[90]** Under s 114(g), the court may presume that the evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. It has long been recognised that this illustration depends on the circumstances presented, particularly, the materiality of the witness not produced. Although I agree that this Datuk Tan is a material witness, it cannot be readily concluded that there has been suppression or withholding of evidence. The lack of testimony from this person appears to be more on

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account of the plaintiff's failure to obtain evidence. This was reminded by the Supreme Court in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492. All that the court is prepared to find in this respect is that the evidence of PW1 and PW2 is not corroborated by an important and material witness.

**[91]** Be that as it may, there is ample evidence before the court, which evidence has already been dealt with, which leads the court to agree with the defendant. In as much as the decisions taken at the meeting bind the plaintiff, they also bind the defendant. Those decisions have been relied on by the respective parties who have since acted and arranged their affairs, especially financial affairs according to those terms. The Court of Appeal in *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 recognised that when this is done, a contract binding on the parties arises. 'The law leans in favour of upholding bargains and not in striking them down willy-nilly'; and although the manner in which the agreement, admission or accord exists may not be your typical formal written contract, it does not detract from the fact that one exists as claimed by the defendant.

**[92]** It is clear and proved by the defendant that the meeting of 29 September 2010 recorded accord between the parties on the various matters in respect of the finalisation of the accounts under the subcontract, the details of which are to be found in the minutes of that meeting, and in particular they are:

(a) that the variation orders had been agreed at RM205,775.50 which amount does not include the value of the omission works which the plaintiff was to submit its details by 6 October 2010 for evaluation;

(b) that debit notes to the value of RM12,647,379.51 for fine, penalty and back-charges for the works and services rendered by the defendant until 16.8.2010 have been agreed; and

(c) that there are two outstanding back charges agreed which have yet to be included. These two items being the hot dipped galvanised iron support for facade lighting and power consumption used for testing and commissioning agreed at RM100,000.

**[93]** I had sought clarification from both counsel before delivering judgment on this issue as to the effect of the court's decision on the meeting. The plaintiff categorically and clearly took the position that the plaintiff's claim must stand dismissed in the event the court decides not in its favour. The defendant on the other hand, opined that the remainder of the plaintiff's claim ought to be proved.

**[94]** In view of the fact that I have found that the meeting accords with the matters as explained by the defendant's witnesses, and since the plaintiff does not see fit to prove any of the remaining matters, the court is left with no other

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alternative but to dismiss the plaintiff's whole claim. Costs in respect of this is reserved to the conclusion of the determination of the defendant's counterclaim.

THE COUNTERCLAIM

**[95]** There is still the matter of the defendant's counterclaim. It concerns what the defendant say is over payment, details of which are found at paras 19 and 20 of the defence.

**[96]** In relation to this, the defendant has led evidence once again through DW1. As pointed out earlier, he is the person responsible for preparing the final accounts. He explained that it was clear from the accounts that the plaintiff had been overpaid for the works done under the subcontract. He told the court that the defendant was about to initiate legal action when the plaintiff beat them to it by serving the defendant with the writ in this action.

**[97]** DW1 proceeded to explain what items (a) to (j) at para 19 of its defence and counterclaim meant and how the figures were arrived at. These details are in the table that has already been set out earlier.

**[98]** DW1 explained that item (a) was the subcontract sum while (b) was the sum for the variation orders as agreed at the meeting of 29 September 2010. Item (c) is the value of 5 omission works which the plaintiff reverted to the defendant through its letter of 7 June 2011 (pp 25–30); a sum of RM56,128. This figure was accepted by the defendant without amendment, as it had agreed at that same meeting. This figure was deducted from the subcontract sum.

**[99]** As for item (d), this was the revised subcontract sum which comprised the earlier three items. Next, is item (e). These were the debit notes where the sum of 12,647,379.51 was agreed to by the plaintiff at the meeting of 29 September 2010. Because the plaintiff had agreed at that meeting that the defendant could issue further debit notes, debit notes for fines, penalties and back charges for the works, materials and services rendered by the defendant to the plaintiff during the defect liability period, additional debit notes to the value of RM174,803.27 were issued bringing the total value to RM12,922,182.78.

**[100]** This sum of RM12,922,182.78 is said to have been accepted by the plaintiff vide its letter dated 20 February 2013 to the defendant (pp 68–74). The plaintiff's own evaluation of the status of the account which was attached to this letter acknowledged the value of the debit notes as standing to the value of RM12,922,182.78. This is recorded in item 6 at p 70.

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**[101]** Moving on to items (f) and (g), the earlier is for a credit note for RM11,200 for the return of workers' passes; while the latter was a sum of RM2,258,000 which were payments previously made to the defendant. The evidence of such payments can be found in the copies of cheques issued by the defendant and the corresponding cheque deposit slips tendered in the bundle of documents marked 'interim certificates received from PBHSB'. There are also acknowledgements by the plaintiff of the payment of this sum as seen in the attachments to the plaintiff's letters to the defendant dated 7 June 2011 and 20 February 2013.

**[102]** As for items (h),(i) and (j), DW1 explained as follow at Q&A 12 of his witness statement:

> 12. Q: Can you explain Item (h)(i) and (j)?
>
> A: Item (h) is the Balance Amount and it shows overpayment of RM869,335.28 to the plaintiff.
>
> Item (i) is the insurance monies of RM255,500 received by the defendant under an insurance claim for the plaintiff's equipment that had been damaged. This amount is credited to the plaintiff.
>
> Item (j) gives the final amount owing by the plaintiff to the defendant. And this works out to RM613,835.28

**[103]** In respect of the monies received from the insurance company, DW1 explained that the plaintiff's equipment was during the project. The defendant made a claim for RM309,000 on behalf of the plaintiff. The insurance company evaluated the salvage value of the damaged equipment to be RM38,500 and further deducted RM15,000 under the terms of the insurance policy. The final amount received by the defendant from the insurers was RM255,500. DW1 testified that this amount was taken into account in the preparation of the final accounts. Evidence of this payment is to be found at pp 21–22 of the bundle of documents marked 'damaged transformer claim and report folder'.

**[104]** According to DW1, the salvage value of the damaged equipment totaling RM38,500 was not credited to the plaintiff's account because:

> A: It was the Plaintiff's obligation to remove its damaged equipment from the worksite under the terms and conditions of the said Letter of Acceptance at Clauses 2.0 i, j and k, (pp 1–10 LAACPR) but the Plaintiff had failed to do so. The said damaged equipment continued to be left on the worksite causing loss and damage to the Defendant who, under the main contract, was obliged to remove all work materials, equipment as well as scrap material from the worksite prior to handling over to the client.

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Had the Plaintiff removed the damaged equipment it could have obtained the salvage value for itself. When it failed to do so the defendant sent the damaged equipment to its store in Kinrara.

However when I checked again I discovered that the damaged transformer was missing from the store and we are unable to locate it.

**[105]** Upon conclusion of DWTs evidence, the defendant closed its case in the counterclaim. The plaintiff chose not to call evidence and submitted that there was no case to answer. The court then put the plaintiff to election and explained the consequences of such election in that in the event the submission fails, no evidence can be led by the plaintiff. Learned counsel on behalf of the plaintiff agreed and maintained the election.

**[106]** Having heard counsel and having perused the evidence, the court finds that the defendant has discharged its burden of proving its counterclaim. In a case of submission of no case to answer, the evidence led is taken as true and correct. The law here is settled — see the Supreme Court decision in *Jaafar bin Shaari & Anor (suing as administrator of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 and the Federal Court decision in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 4 MLJ 66; [2010] 1 CLJ 381, that the evidence *'... must be presumed to be true'*.

**[107]** In his submissions, learned counsel for the plaintiff contended that since DW1 had admitted that a substantial number of the debit notes had not been acknowledged, the defendant's counterclaim is therefore not proved. Further, since the defendant had wrongfully withheld the sum of RM53,500 from the plaintiff which it now testifies that the sum is RM38,500 supports its contentions. The defendant submitted that all these monies are in fact the plaintiff's and the counterclaim should be dismissed.

**[108]** Dealing first with the debit notes. In this regard, the plaintiff's own actions in relation to the debit notes, though not acknowledged, but over quite a substantial period July 2008–July 2010, with the meetings and correspondence exchanged between parties, in fact confirms DW1's testimony. The correspondence reveal that the plaintiff itself was not in doubt over the debit notes, the amount stated therein, or what they signify. As seen earlier, the plaintiff never objected to any of these records but instead, in its correspondence and dealings with the defendant, the plaintiff readily accepted the sums due under the debit notes without reservation.

**[109]** As for the insurance claim of RM53,500, this sum has in fact been amended at the start of the hearing of the counterclaim to RM38,500. The plaintiff confirmed this amendment. With that, the defendant's claim now stands as RM575,335.28.

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**[110]** DW1 was cross-examined. Despite strenuous cross-examination, he remained resolute, and most important, honest and sincere in his answers. I find him candid, truthful and clear minded; this was indeed my earlier finding and it remains the same. The court finds DW1's testimony credible, cogent and supported by the contemporaneous documents exchanged between the parties at the material time.

**[111]** The court has no other evidence in relation to the counterclaim save that which was led by the defendant. Since the court believes in the testimony of DW1, and there is no evidence to the contrary from the plaintiff in response to the counterclaim, the court finds that the defendant has discharged its burden of proving on a balance of probabilities its counterclaim; and that burden has shifted to the plaintiff to answer the claim. There is, indeed, a case to answer or meet.

**[112]** Accordingly, the plaintiff's submission of no case to answer is dismissed; and the defendant's counterclaim as prayed in para 22 of the defence and counterclaim is allowed together with interest on the sum of RM575,335.28 at 5%pa from today to the date the realisation together with RM30,000 as costs for the whole case.

*Plaintiff's claim dismissed and defendant's counterclaim allowed with costs.*

Reported by Kanesh Sundrum